ATTORNEY FOR APPELLANT:

MARK A. BATES
Lake County Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANDREW EVANS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0609-CR-441
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM 4
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0506-FB-00052

June 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Andrew Evans, pleaded guilty to one count of Dealing in a Schedule I Controlled Substance, a Class B felony, and was sentenced to ten years incarceration. Upon appeal, Evans claims that the trial court erred in sentencing him.

We affirm.

The record reveals that on June 19, 2005, Evans was caught by the police with a plastic baggie containing three folded pieces of paper, each of which contained heroin. On June 28, 2005, the State charged Evans with one count of dealing in a schedule I controlled substance as a Class B felony. On June 20, 2006, Evans and the State entered into an agreement whereby Evans agreed to plead guilty as charged. The agreement provided for a twelve-year cap on the sentence, but otherwise left sentencing to the discretion of the trial court.

On August 23, 2006, the trial court held a sentencing hearing, at which the trial court identified aggravating and mitigating factors. The court identified as aggravating the fact that Evans was on bond at the time he committed the current offense, that he had a criminal history, including a conviction for possessing marijuana and a conviction for attempted battery by means of a deadly weapon, and that Evans had had his probation revoked in the past. The trial court identified as mitigating the fact that Evans had pleaded guilty, thereby accepting responsibility for his crime, and that Evans had a self-described drug abuse problem. The trial court concluded that the aggravators and mitigators were equal and therefore sentenced Evans to the advisory term of ten years incarceration. Evans filed a notice of appeal on September 22, 2006.

Upon appeal, Evans claims that his sentence is inappropriate, citing Indiana Appellate Rule 7(B). In doing so, Evans claims that the trial court did not afford sufficient weight to the mitigating factors. The State responds that, under the post-Blakely "advisory" sentencing scheme,[1] challenges to the trial court's finding of aggravating and mitigating factors are no longer cognizable, citing Creekmore v. State, 853 N.E.2d 523 (Ind. Ct. App. 2006), reh'g denied, and Fuller v. State, 852 N.E.2d 22 (Ind. Ct. App. 2006), trans. denied. To be sure, both of these cases held that any error in the identification of aggravators and mitigators was harmless under the advisory sentencing scheme. See Creekmore, 853 N.E.2d at 531 ("Put simply, the new statutory scheme does not require the finding and balancing of aggravating and mitigating circumstances."); Fuller, 852 N.E.2d at 26 ("[A] sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.").

The State makes no mention, however, of the split which has emerged in this court with regard to the manner in which appellate review should be conducted under the advisory sentencing scheme. Compare Creekmore, 853 N.E.2d at 531, and Fuller, 852 N.E.2d at 26, with McMahon v. State, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (holding that because the sentencing statutes still require a sentencing statement by the trial court if the court finds aggravating or mitigating circumstances, the General Assembly intended to require a sentencing statement any time the trial court imposes a sentence other than the advisory sentence). Despite this, there appears to be a consensus that, at

[1] In response to Blakely, Indiana's sentencing statutes were amended effective April 25, 2005 to refer to an "advisory" instead of a presumptive sentence.

the very least, sentencing statements by the trial court provide meaningful assistance to this court in our review under Appellate Rule 7(B). See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006). Here, whether we view Evans's challenge to his sentence as an attack on the trial court's weighing of the mitigating factors or as a more general attack on the appropriateness of his sentence under Appellate Rule 7(B), his challenge fails.

With regard to the weight afforded to the mitigating factors, we remind Evans that it is for the trial court to determine which mitigating circumstances to consider. Gray v. State, 790 N.E.2d 174, 176 (Ind. Ct. App. 2003). The trial court is solely responsible for determining the weight to accord such factors and is not obliged to weigh or credit mitigating factors the way a defendant suggests. Id.; Hedger v. State, 824 N.E.2d 417, 420 (Ind. Ct. App. 2005), trans. denied. Here, the trial court recognized as mitigating the fact that Evans had pleaded guilty and accepted responsibility for his actions. Moreover, the trial court accepted as mitigating Evans's self-described problem with drug abuse. However, the trial court also identified aggravating factors, including a criminal history which is not insubstantial. Specifically, in addition to numerous arrests, Evans was convicted in 1997 of misdemeanor possession of marijuana. In 1998, Evans was again convicted of misdemeanor possession of marijuana. In 2001, Evans was charged with attempted murder and attempted battery by means of a deadly weapon and ultimately pleaded guilty to the latter charge. In that case, Evans was sentenced to six years, with two years suspended to probation. While on probation in that case, Evans had his probation revoked. In 2004, Evans pleaded guilty to B felony dealing in cocaine and was

out on bond on that case when the present crime was committed. Given these circumstances, we cannot say that the trial court erred in concluding the identified mitigating factors were in balance with the aggravating factors.

We are also unable to say that Evans's advisory ten-year sentence was inappropriate. Pursuant to Appellate Rule 7(B), we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Evans admits that, under the former presumptive sentencing scheme, where the aggravators and mitigators are in equipoise, the presumptive sentence was usually considered appropriate. See Morgan v. State, 829 N.E.2d 12, 18 (Ind. 2005) (wherein our Supreme Court determined that valid aggravators and mitigators were in equipoise and directed the trial court to revise the sentence to the presumptive sentence); Kilgore v. State, 720 N.E.2d 1155, 1156 (Ind. 1999) (where aggravating and mitigating circumstances were essentially in equipoise, presumptive sentence was not manifestly unreasonable).[2]

We conclude that the same is true under the advisory sentencing scheme; the advisory sentence is the starting point the General Assembly has selected as an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). Thus, when there are no aggravators or mitigators, or the aggravators or

[2] Prior to January 1, 2003, Indiana Appellate Rule 7(B), and the corresponding former Appellate Rule 17(B), provided, "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." The current rule reads, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We recognize the current language grants appellate courts broader authorization to revise sentences. See Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

mitigators are in equipoise, the advisory sentence is generally an appropriate sentence. In the present case, the aggravators and mitigators were in equipoise, and the advisory ten-year sentence imposed by the trial court is not inappropriate, especially in light of the nature of Evans's offense or his character. Evans had a criminal history which was not insubstantial, and he had violated probation and bond when he had been given such graces in the past. Although Evans may have a substance abuse problem, this does not excuse his repeated violation of the law, including his conviction in the present case.

The judgment of the trial court is affirmed.

VAIDIK, J., concurs.

ROBB, J., concurs in result.